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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, APRIL 29, 2002

APPLICATION OF

MIRANT DANVILLE, LLC

CASE NO. PUE-2001-00430

For approval of a certificate of public convenience and necessity pursuant to Va. Code § 56-265.2, an exemption from Chapter 10 of Title 56 and interim approval to make financial commitments and undertake preliminary construction work

ORDER

On August 16, 2001, Mirant Danville, LLC (“Mirant Danville” or “Applicant”) filed an Application requesting that the Commission grant Mirant Danville a certificate of public convenience and necessity pursuant to Va. Code Ann. § 56-265.2 to construct an 870 MW natural gas-fired electric generating facility (“Facility”) at the AirSide Industrial Park in Danville, Virginia. The Applicant also seeks an exemption from the provisions of Chapter 10 of Title 56, pursuant to Va. Code Ann. § 56-265.2 B, and interim approval to make financial expenditures and undertake preliminary construction work, pursuant to Va. Code Ann. § 56-234.3.

On September 10, 2001, the Commission entered an order requiring Mirant Danville to provide public notice of its Application, establishing a procedural schedule for the filing of testimony and exhibits, scheduling an evidentiary hearing, and appointing a Hearing Examiner to hear this case. The evidentiary hearing was held on December 5, 2001, before Chief Hearing Examiner Deborah V. Ellenberg. Richard D. Gary, Esquire, John M. Holloway III, Esquire, and Angela Jenkins, Esquire, appeared on behalf of Mirant Danville. M. Renae Carter, Esquire, appeared on behalf of Columbia Gas of Virginia, Inc. Carter Glass, IV, Esquire, and Timothy Spencer, Esquire, appeared on behalf of the City of

Danville. Katharine A. Hart, Esquire, and Allison L. Held, Esquire, appeared on behalf of the Commission Staff.

On February 4, 2002, Chief Hearing Examiner Deborah V. Ellenberg entered a Report in which the Examiner summarized the record, analyzed the evidence and issues in this proceeding, and made certain recommendations, including that the Application should be granted with conditions. In the Report, the Hearing Examiner also noted that a recent news article announced the cancellation of this project, and the Examiner recommended that the Applicant be directed to file written notice of its intent concerning this Facility as soon as possible. On February 6, 2002, Mirant Danville filed notice to the Commission of its intent with regard to the project and explained that it is seeking a new developer to complete and to operate the project.

NOW THE COMMISSION, having considered the record, the Hearing Examiner's Report, the Applicant's notice of intent, and the applicable law, is of the opinion and finds as follows. This case, at this juncture, must be remanded to the Hearing Examiner for further proceedings with respect to consideration of: (1) the environment; and (2) the new developer that will construct and operate the project. The Hearing Examiner will determine, after receiving input from the participants in this case, the procedures to be employed on remand for consideration of these issues. We also find that Mirant Danville may make financial expenditures and undertake certain preliminary construction work on electric generating facilities without prior approval from the Commission.

The Environment

As set forth in *Tenaska*,¹ the Code of Virginia establishes six general criteria, or areas of analysis, that apply to electric generating plant applications.² The six criteria are as follows: (1) reliability;³ (2) competition;⁴ (3) rates;⁵ (4) environment;⁶ (5) economic development;⁷ and (6) public

¹ *Application of Tenaska Virginia Partners, LP, For approval of a certificate of public convenience and necessity pursuant to Virginia Code § 56-265.2, an exemption from Chapter 10 of Title 56, and interim approval to make financial commitments and undertake preliminary construction work*, Case No. PUE-2001-00039, Order (Jan. 16, 2002) ("*Tenaska*").

² *Id.* at 13-14.

³ Va. Code Ann. §§ 56-580 D(i) and 56-46.1 A.

⁴ Va. Code Ann. § 56-596 A.

interest.⁸ The Hearing Examiner's Report addressed these six criteria. As discussed below, we find that the record is incomplete with respect to the consideration of the environment.⁹ In this regard, the Hearing Examiner concluded that the Facility will have only a minimal impact on the environment. The Hearing Examiner also noted that no witness raised any concern with the cumulative impacts of this Facility on the surrounding community.

As found in *Tenaska*, we interpret Virginia law as requiring us to consider the cumulative impacts of other facilities, together with the Applicant's Facility, on the existing air quality in the area that may be impacted by the Facility. Though the issue of cumulative air impacts was not raised at the hearing, the requirement that we consider such impacts remains. In *Tenaska*, we explained that changes in circumstances and the law in recent years required that we review our approval of the construction and operation of new generating facilities. We concluded, as we do here, that we cannot comply with our statutory obligations, implement constitutional policy, and consider properly the impact of the Facility on the environment without addressing the cumulative impact issue.

Accordingly, for us to consider adequately the environmental impacts of the proposed Facility, we must consider cumulative impacts. An appropriate record, however, has not been developed on this issue. For example, the record does not address the existing air quality with respect to various criteria pollutants, or the cumulative impact on existing air quality for criteria pollutants from the Facility and other proposed facilities that will add to such pollutants. As we found in *Tenaska*, we must first know where on the continuum of air quality the area impacted by the Facility falls for each criteria pollutant. General terms such as "attainment" are not sufficient; we need to know, for example, how close current air quality is to "nonattainment." We also need to know what impact the Facility and other facilities, including proposed electric generating units and other major facilities, may have on the area.

⁵ Va. Code Ann. §§ 56-580 D(ii); 20 VAC 5-302-20 14. *See also Tenaska* at 15-16, n.15; *Ex Parte: In the matter of amending filing requirements for applications to construct and operate electric generating facilities*, Case Nos. PUE-2001-00313 and PUE-2001-00665, Order Adopting Rules and Prescribing Additional Notice at 6 (Dec. 14, 2001).

⁶ Va. Code Ann. §§ 56-580 D and 56-46.1 A.

⁷ Va. Code Ann. §§ 56-46.1 and 56-596 A.

⁸ Va. Code Ann. §§ 56-580 D(ii).

⁹ We recognize that the *Tenaska* decision was issued subsequent to the hearing in this case.

Consistent with our explanation in *Tenaska*, for purposes of such analyses, decisions must be made as to which proposed facilities to consider and how a study should be structured and implemented. As also discussed in *Tenaska*, our hope remains that interested parties, Staff, and the Department of Environmental Quality (“DEQ”) could help establish how these issues might be best addressed as promptly as practicable. We emphasize that we do not desire to delay construction. Rather, we must address the important issues discussed in this order and carry out our statutory obligations.

Senate Bill No. 554

We also recognize that the General Assembly recently passed Senate Bill No. 554 (“SB 554”), which places additional requirements and limitations on this Commission’s review of proposed electric generating facilities. SB 554 requires the Commission to enter into a memorandum of agreement with the DEQ regarding the coordination of reviews of environmental impact of electric generating plants and associated facilities. The Commission looks forward to working cooperatively with the DEQ to conclude the agreement as soon as practicable.

SB 554 also requires the Commission, in order to avoid duplication of governmental activities, to defer to other governmental entities in certain circumstances. Though SB 554 is not yet effective, we emphasize that matters referenced in SB 554 that (i) are governed by a permit or approval, or (ii) are within the authority of and were considered by the governmental entity issuing a permit or approval, are relevant to the Commission’s review of the Facility and will be fully considered in our determination. Indeed, § 56-46.1 A requires us to give consideration to all reports that relate to a proposed facility by state agencies concerned with environmental protection. It is not our intent to duplicate activities already undertaken by other governmental entities.

Applicant’s Notice of Intent

On February 6, 2002, Mirant Danville filed notice to the Commission of its intent with regard to the project. That notice stated, among other things, that Mirant Danville: (1) announced on January 31, 2002, that it had indefinitely deferred construction of the project; (2) has initiated the process to find a suitable developer for the project and is dedicated to concluding this process as quickly as possible; and

(3) requests the Commission to continue to process the Applicant's request for a certificate. Mirant Danville also asserts that when a new developer is selected, requisite information showing the financial and technical ability of the new developer to complete and operate the project will be submitted.

We will continue to process the Application, as requested by the Applicant. We will not, however, issue a certificate to construct and operate electric generating facilities without knowledge of the entity or entities that will construct and operate such facilities. Accordingly, Mirant Danville and the new developer, once chosen, must amend the Application as necessary. The Hearing Examiner will determine, after receiving input from the participants in this case, the procedures to be employed on remand for consideration of: (1) the environment; and (2) the new developer. For example, the Examiner may determine whether, on remand, consideration of the environment occurs separately from, or contemporaneously with, consideration of the new developer.

Interim Approval

The Hearing Examiner also recommended that the Commission grant Mirant Danville interim approval under § 56-234.3 to make financial expenditures and to undertake preliminary construction work, if such approval is deemed necessary. We take this opportunity to affirm that Va. Code Ann. § 56-580 D supplants §§ 56-234.3 and 56-265.2 in the Commission's approval process for electric generating facilities on and after January 1, 2002.¹⁰ Indeed, in recently ruling on an issue of first impression, we concluded that an applicant may commence certain preliminary construction work on electric generating facilities without prior approval from the Commission.¹¹ We did not, however, permit construction of any permanent structure absent prior approval from the Commission.

Likewise, we find that Mirant Danville may make financial expenditures and undertake preliminary construction work on electric generating facilities without prior approval from the

¹⁰ See, e.g., *Ex Parte: In the matter of amending filing requirements for applications to construct and operate electric generating facilities*, Case Nos. PUE-2001-00313 and PUE-2001-00665, Order Adopting Rules and Prescribing Additional Notice at 2 (Dec. 14, 2001); *Ex Parte: In the matter of amending filing requirements for applications to construct and operate electric generating facilities*, Case No. PUE-2001-00313, Order at 5 (Aug. 3, 2001).

¹¹ *Application of Chickahominy Power, LLC, For authority to construct and operate an electric generating facility in Charles City County*, Case No. PUE-2001-00659, Order for Notice and Hearing (Feb. 7, 2002).

Commission. No construction of a permanent structure, however, may be undertaken without Commission approval. Any financial expenditures or preliminary construction is at the sole risk of the Applicant. The Applicant still must comply with any statute, ordinance, rule, or regulation affecting its proposed activity. The Applicant also proceeds at the risk that subsequent orders by the Commission, if warranted and supported by the record developed in this proceeding, may adversely affect any action taken by the Applicant prior to receiving a certificate.

Accordingly, IT IS ORDERED THAT:

(1) Mirant Danville may make financial expenditures and undertake certain preliminary construction work on electric generating facilities without prior approval from the Commission.

(2) This matter is remanded to the Hearing Examiner for further proceedings and recommendations as set forth herein.

Morrison, Commissioner, DISSENTING OPINION.

I must respectfully dissent to the Majority's decision to remand this case for further proceedings before the Hearing Examiner in order to give more consideration to the impact of this facility on the environment.¹ The Majority relies upon its decision in the Tenaska Case, decided January 16, 2002, and concluded ". . .that we cannot comply with our statutory obligations, implement constitutional policy, and consider properly the impact of the facility on the environment without addressing the cumulative impact issue."

In Tenaska, I authored a lengthy Dissenting Opinion, and much of its content is applicable here in explanation of this Dissent. With that reference, I shall not add to the length of this order by repeating in such detail my reasons for objecting to the Majority's decision to remand this case.

As was the case in the Tenaska Remand, here the Majority imposes the requirement that "cumulative impacts" of air emissions be "considered." This is a substantial additional and, I believe, different standard for adjudication of this Application, and its imposition comes long after the hearing and the close of the evidentiary record. It occurs with no change in the statutory law, nor a change in any regularly promulgated Rule or Regulation of this Commission. It is in this sense that I consider the Order of the Majority to be contrary to the law. Moreover, it is obviously entered without evidence to support it, for the issue of cumulative air impacts was not raised by a single participant or public witness in the case. Participants in this case and the

¹ The Majority Order remanding this case has been entered coincidentally with orders remanding Case Nos. PUE-2001-00169, Application of CinCap Martinsville, LLC, and PUE-2001-00423, Application of Kinder Morgan Virginia, LLC. Because all three orders are substantially identical, this Dissenting Opinion is likewise filed in those cases.

two other similar cases decided today may understandably feel victimized by this sort of retroactive judicial rulemaking, a misadventure which strikes me as offending due process and the provisions of § 12.1-28.²

In this case and the two others decided today, there is a striking similarity in the universality of support within the respective communities. That support includes the enthusiastic reception by the respective units of local government. The locations of the facilities are in areas of the Commonwealth that have experienced considerable economic stress which will be ameliorated by the economic benefits derived from their construction. The records show that the resulting increase in the local property tax base is badly needed. Assuming that all three facilities are eventually constructed in the face of the consequences caused by the Majority Remand, the delays in construction may well cause economic loss to be suffered not only by the Applicants, but also by the respective local economies, both in the public and private sectors.

This degree of economic loss might well be justified if this facility and the two others like it threatened any significant harm to the environment. The Hearing Examiners found that the evidence in these cases showed no such threat to the air quality in the Commonwealth.

What then is the overarching mandate felt by the Majority to cause either delay or abandonment of these proposed natural gas-fueled facilities? It is simply the Majority Order in the Tenaska Remand and its underlying interpretation by my colleagues that Virginia law requires this Commission " . . .to consider the cumulative impacts of other facilities, together with the Applicant's facility, on the existing air quality in the area that may be impacted by the

² See Dissenting Opinion, Jan. 16, 2002 in Application of Tenaska Virginia Partners, LP, Case No. PUE-2001-00039 for discussion of application of § 12.1-28 in the context of the pending Rules proceeding, PUE-2001-

facility." Obviously, I continue to disagree with such interpretation. So did the General Assembly.

Senate Bill 554 passed by the Legislature during its most recent Session (*Acts of Assembly 2002*, Ch. 483) amended §§ 56-46.1 and 56-580 of the Code, the sources of the recently discovered requirements devolving upon us to consider the cumulative impacts of an Applicant's facility with other facilities on existing air quality. I believe it is clear that the thrust of the 2002 Amendments is that we are not to duplicate the functions of environmental agencies by involving ourselves with environmental issues that are subsumed by permits or approvals issued or to be issued by appropriate agencies as are within their authority and considered by them.

The Majority Order discusses SB 554 as if it is something of a balancing mechanism to divide the consideration of environmental issues between this Commission and environmental agencies of the Commonwealth. The Majority states that the bill". . .places additional requirements and limitations on this Commission's review of proposed electric generating facilities." I find no additional requirements for environmental consideration in the language of the Bill; the requirement on this Commission is that it enter into the Memorandum of Agreement with the Department of Environmental Quality, as stated by the Majority; otherwise, the Bill largely eviscerates the mandate of the Tenaska Remand decision by its limitations on this Commission's actions with regard to environmental issues properly, and more appropriately, falling within the purview of other agencies.

The Majority's discussion of SB 554 omits any recognition of one of its portions bearing directly on the cumulative impact issue. In addition to amending the two Code Sections in Title 56, the Bill created a new Code Section, § 10.1-1186.2:1. Paragraph A. of that Section provides as follows:

The Department and the State Air Pollution Control Board have the authority to consider the cumulative impact of new and proposed electric generating facilities within the Commonwealth on attainment of the national ambient air quality standards.

It would be implausible to suppose that DEQ and the Air Pollution Control Board would not have the authority to consider the cumulative impact of proposed generating facilities without this new statute. Rather than a delegation of new powers to these agencies, it is a delineation of functions between them and this Commission, being necessary, I am afraid, because of our recent quixotic appropriation of their functions signaled by our Rules proceeding, PUE-2001-00665, and executed by the Tenaska Remand Order.

With such a clear statement of legislative intent that this Commission stay out of the cumulative impact issue, it is difficult to understand why the Majority stubbornly clings to a recently invented requirement that we consider the cumulative impacts of various facilities when probably we will be foreclosed from doing so in about two months hence when SB 554 becomes effective.

The Remands of this Case and the two others like it raise a number of questions. If the Applicants continue to pursue the projects, will the limiting nature of SB 554 be observed? Will the answer to that question depend upon when the remand hearings are held? At remand hearings, should the Applicant attempt to satisfy the cumulative impact issue as demanded by

the Majority, or as may be hereafter required by the State Air Pollution Control Board by virtue of new Code § 10.1-1186.2:1, or both? Is the answer to these questions in part dependant upon the terms of the working agreement to be entered into by this Commission and DEQ, even though there is not even a first cut draft for Applicants to review at this time? Since the Majority expects the Hearing Examiners in these cases to expedite the matters, will the Hearing Examiners be so lenient as to postpone the all-important ". . .development of an appropriate record" until after July 1, 2002, if requested by an Applicant or Applicants? Even in such a case, will a majority of this Commission decide a case coming back from Remand under the law as it existed at the time the Application was filed, or as it has been changed by SB 554 during the course of the proceedings? Would one or more of these Applicants be well advised to consider seeking a dismissal of the Application without prejudice in order to start again with a new Application clearly governed by the provisions of SB 554?

I believe these imponderables further illustrate how unfair it is to Applicants in these cases to remand at this time. No one can seriously contend that any of these projects will have more than a minimal effect on ambient air quality, whether measured by current Air Control Board procedures or on some cumulative impact basis. One might wonder if this Commission in its Majority Order fully appreciates the large capital expense to the Applicants involved in the development of the projects to this point, in processing the Applications thus far, and how much more costly it will be because of this unnecessary delay.

The better course, I submit, is to approve these three Applications coincidentally decided. I would also use this opportunity to announce that any pending applications for electric generation facilities, and any such applications hereafter filed before July 1, 2002, will be

considered consistent with the provisions of SB 554. Although there may not be an occasion for such policy to apply, it would ensure that the kind of uncertainty and confusion described herein would occur no more.

I recognize that the Applicant in this case has indefinitely deferred construction of the project and is in the process of finding a suitable developer to build it. Under these circumstances our approval could be granted, as recommended by our Staff Counsel and the Hearing Examiner. If the entity, Mirant Danville, LLC, is acquired by another entity, it will succeed to the property rights of Mirant, including the certificate of public convenience and necessity for the construction and operation of the facility. If Mirant as an entity is not purchased, any successor would be required to obtain a certificate for the construction or operation of the facility.

In addition to its supposed "statutory obligations," the Majority claims it is duty bound to "implement constitutional policy" by addressing the cumulative impact issue.

I must reiterate that this represents to me a complete misunderstanding of this Commission's role with respect to Article XI of the Virginia Constitution. Section 1 of Article XI states that ". . .it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings." The last sentence of that Section provides:

Further, it shall be the Commonwealth's policy to protect its atmosphere, lands and waters from pollution, impairment or destruction for the benefit, enjoyment and general welfare of the people of the Commonwealth.

If this Section were self-executing, read literally, no amount of pollution or impairment from any source could be permitted. Not only could generation facilities not be permitted,

prosecuting attorneys should seek to enjoin the operation of all generation plants. Indeed, no internal combustion engine should be permitted to operate.

This Section has been held not to be self-executing.³ Moreover, the provisions of the succeeding Section avoid the apparent absurdity of a literal interpretation of that policy. Section 2 of Article XI provides that such policy is to be implemented by the General Assembly. As I attempted to explain in my Dissenting Opinion in *Tenaska*, the General Assembly has enacted innumerable statutes and created various agencies in the implementation of the conservation policies broadly set forth in § 1 of Article XI. In fact, SB 554 is yet another example. It is so fundamental as to warrant no citation that the State Corporation Commission has no inherent power. To the extent we are required to consider environmental matters, that duty is delegated to us by the General Assembly, not directly to us from the Constitution.

The Majority Order speaks of a need to develop "an appropriate record" from which "we must first know where on the continuum of air quality the area impacted by the facility falls for each criteria pollutant." The Majority also thinks it is necessary to know "how close current air quality is to 'nonattainment'."

I am puzzled to know just what we are to do with this information. As I have stressed before, we have no particular expertise among ourselves or our staff to evaluate air quality matters, much less the authority to do so. If this facility and others under consideration do not violate air quality standards, as set by federal and state environmental agencies, by what measurement is the Majority prepared to impose a different standard? It seems to me that any

³ *Robb v. Shockoe Slip Foundation*, 228 Va. 678, 324 S.E. 2^d 674 (1985).

denial based upon standards other than those determined by other appropriate agencies necessarily will be arbitrary and capricious.